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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.....

GEORGE R. COOKE COMPANY,
Petitioner,
vs.
NICK MAKI,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, George R. Cooke Company, defendant in the above entitled matter, respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This is a civil action instituted in the United States District Court for the Eastern District of Michigan, by Nick Maki, respondent herein, as plaintiff, against George R. Cooke Company, a Michigan corporation, petitioner herein, as defendant, to recover for injuries to the person of the plaintiff.

The jurisdiction of the District Court was based solely upon diversity of citizenship and the questions involved arise solely upon the pleadings, to-wit, the Complaints (R. 4-7, 10-13), the Motion to Dismiss (R. 8) and Objection to motion to File Amended Amended Complaint (R. 13).

Respondent in his complaints alleged that he had been employed by the petitioner in Minnesota for the period from August 1934 to May 13, 1935 (R. 4, 10); that the petitioner owed a duty to the respondent to provide machinery of a kind and nature to eliminate all foreign materials from the air in the tunnel where respondent worked and a duty to keep the said place in condition so that the air would be free from all foreign substances (R. 5, 11); that the petitioner was negligent in failing to provide such machinery and in failing to keep the tunnel in such condition as to have the air in the tunnel free from all foreign substances (R. 6, 12); that the petitioner, in addition to a violation of such duty, had violated Section 4174 of Mason's Minnesota Statutes of 1927, requiring an employer to provide in each work room proper and sufficient means of ventilation and to maintain proper and sufficient ventilation (R. 5, 11), and that "as a consequence and proximate result of the defendant's neglect as afore-

said * * *" respondent was caused to breathe foreign materials, causing respondent, on or about December 15, 1936, to become affected with pneumoconiosis and tuberculosis and claimed damages therefor in the sum of Twenty-five Thousand Dollars ($25,000.00) (R. 6, 12).

The suit was instituted in the District Court for the Eastern District of Michigan, Southern Division, on July 21, 1939 (R. 1), more than three (3) but less than six (6) years after the last date of respondent's employment and less than three (3) years from the date on which respondent alleged he became "affected with pneumoconiosis and tuberculosis."

Petitioner moved to dismiss (R. 8) and objected (R. 13) to the complaints on the ground that the court lacked jurisdiction over the subject matter and that the complaints failed to state a claim against the petitioner upon which relief could be granted. The basis of the motion and objection was, in brief, that the respondent's cause of action, if any, accrued on or before May 13, 1935 (the last date upon which respondent was in the employ of the petitioner) and not within three (3) years immediately prior to the commencement of the action and that the maintenance of such action was barred by the provisions of Section 13976 of the Compiled Laws of Michigan of 1929, which section provided, among other things, that actions to recover damages for injuries to person or property shall be brought within three (3) years from the time said action accrued and not afterwards (R. 8-9, 13, 14).

The District Court held that respondent's claimed cause of action accrued not later than May 13, 1935 (the last date upon which respondent was employed by petitioner) and that more than three (3) years having elapsed from such date prior to the institution of the suit its mainte-

nance in a United States District Court, sitting in Michigan, was barred by the Michigan Statute of Limitations and dismissed the action (R. 3, 15).

Respondent appealed to the Circuit Court of Appeals for the Sixth Circuit, from the Order dismissing the action, relying upon two grounds—(R. 16)

(1) That the time within which the cause of action should be commenced was governed by the laws of the State of Minnesota, relying particularly upon Section 9191 of Mason's Minnesota Statutes of 1927, providing a 6-year limitation period;

and

(2) That the respondent's cause of action did not accrue until December 15, 1936 and hence was not barred by Section 13976 of the Compiled Laws of Michigan of 1929, providing a 3-year period.

The Circuit Court of Appeals reversed the Order of the District Court and remanded the case for trial upon its merits (R. 19), holding that the statute of limitations applicable in this proceeding was Section 9191, Mason's Minnesota Statutes of 1927, that being the statute of the state in which the cause of action arose, and that prosecution of the claim was not barred by the applicable Michigan statute (R. 20-24). In view of this holding, the Circuit Court of Appeals did not pass upon the question of whether the cause of action accrued on or before the last day of respondent's employment by the petitioner or upon the date upon which respondent alleged the pneumoconiosis and tuberculosis developed (R. 24) and this question is not involved in this petition.

The Opinion of the Circuit Court of Appeals below, filed on January 9, 1942, is reported in 124 F. (2d) 663 and will be found at pages 20-24 of the Transcript of Record filed

herewith. The District Court filed no Opinion. The statutes involved, to-wit, the Section of the Minnesota ventilation statute, violation of which is claimed by respondent (Mason's Minnesota Statutes of 1927, Section 4174), the Michigan Statute of Limitations (Compiled Laws of Michigan, 1929, Section 13976) and the Minnesota Statute of Limitations relied on by respondent (Mason's Minnesota Statutes of 1927, Section 9191) are set forth as appendices 1, 2 and 3, respectively, to the brief in support hereof and filed herewith and will be found on pages 29 to 32.

II.

BASIS OF JURISDICTION TO REVIEW

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 347(a).

The Opinion of the Circuit Court of Appeals for the Sixth Circuit was filed on January 9, 1942 (R. 20) and the Judgment of the Circuit Court of Appeals reversing the Order of the District Court and remanding the cause of trial upon its merits was entered on the same day (R. 19). Petition for Rehearing was filed on February 6, 1942 (R. 25) and denied by the Circuit Court of Appeals on February 12, 1942 (R. 37).

III.

QUESTIONS PRESENTED

Two fundamental questions are presented—

(1) In a suit instituted for the recovery of damages for injuries to the person of the plaintiff, claimed to have resulted from the failure of the defendant to comply with a statute of the state where plaintiff was employed, requiring proper and sufficient ventilation, is another separate

and distinct statute of the same state providing that a large number of different types of actions, including actions "upon liability created by statute," shall be commenced within six (6) years, a limitation statute affecting only actions commenced in such state or does such limitation statute have extra territorial effect and control the time within which such suit must be brought in every jurisdiction?

In the instant case respondent relied upon a violation of the Minnesota ventilation statute (R. 5, 11) and the Circuit Court of Appeals held that an entirely separate and distinct statute (sub-section 2 of Section 9191 of Mason's Minnesota Statutes of 1927) was not solely remedial in character but was a substantive part of a newly created right and controlled the time within which the right might be enforced wherever brought.

Petitioner contends that the Circuit Court of Appeals erred in this respect and that the above-mentioned Minnesota limitations statute is but a general statute of limitations controlling the remedy in Minnesota but having no effect outside of Minnesota.

(2) Where such an action is brought in a District Court sitting in a state other than the state where the cause of action accrued, the general statute of limitations of which provides that actions to recover damages for injuries to persons shall be brought three (3) years from the time such action accrues and not afterwards, may such action be maintained if not instituted within three (3) years from its accrual?

The Circuit Court of Appeals not only held that the Minnesota statute was more than a remedial statute and conditioned the right created, but that it operated in a suit instituted in the District Court sitting in Michigan to the exclusion of the applicable Michigan Statute of Limitations.

Petitioner contends that the Circuit Court of Appeals erred in this respect—that even though the Minnesota statute be considered as one "conditioning" a newly created right and preventing its enforcement anywhere after the expiration of the time there mentioned, it does not operate to the exclusion of the general remedial statute of the forum and permit an action after the expiration of the period established in an applicable statute of the forum.

In addition to the two foregoing fundamental questions one further matter is involved—respondent's complaints counted not only on violation of the Minnesota ventilation statute but also on common law negligence. Even under the holding of the Circuit Court of Appeals such an action was barred and the Order of the District Court should have been sustained to the extent that it dismisses that portion of the cause of action based on common law negligence.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals in holding that the Minnesota Statute of Limitations relied upon by the respondent was more than a general statute of limitations controlling the remedy and had extra territorial effect has decided an important question of local law in a way in conflict with the applicable local decisions.

Such holding appears to be contrary to the law of Minnesota as indicated in the following decisions of the Minnesota Supreme Court:

In re Daniel's Estate, 208 Minn. 420; 294 N. W. 465.

Kozisek v. Brigham, 169 Minn. 57; 210 N. W. 622.

It is also in conflict with the law of Michigan as indicated in—

Bement v. Railway Co., 194 Mich. 64; 160 N. W. 424.

The decision of the Circuit Court of Appeals that the Minnesota statute of limitations was something more than a remedial statute is also contrary to the holding of the Circuit Court for the District of Massachusetts.

Dexter v. Edmands, 89 F. 467 (C. C., D. Mass. 1898).

2. The Circuit Court of Appeals in this case in not giving effect to the controlling statute of limitations of the forum has decided an important question of local law in a way in conflict with applicable local law and decisions.

While no Michigan case has been found in which the facts were precisely the same as the case at bar, it is respectfully submitted that the holding of the Circuit Court of Appeals that the applicable Michigan Statute of Limitations is not controlling is in conflict with the law of Michigan as indicated by the following decisions of the Supreme Court of Michigan:

Ten Eyck v. Wing, 1 Mich. 40;
Gorman v. Circuit Judge, 27 Mich. 138;
Shadock v. The Alpine Plank Road Co., 79 Mich. 7; 44 N. W. 158;
Home Life Co. v. Elwell, 111 Mich. 689; 70 N. W. 334;
Blackburn v. Blackburn, 124 Mich. 190; 82 N. W. 835;

Bement v. Railway Co., 194 Mich. 64; 160 N. W. 424;

Buzzn v. Muncey Cartage Co., 248 Mich. 64; 226 N. W. 836.

3. The decision of the Circuit Court of Appeals in this case that the action might be maintained within the time limited by the law of the state where the cause of action accrued, even though after the time established by the limitation statute of the forum is in conflict with the decisions of other Circuit Courts of Appeal.

In the Second and Seventh Circuits it has been held that, although a foreign statute of limitations, part of a statutory cause of action, might have the effect of destroying the cause of action so that the suit thereon might not be maintained anywhere, such statute does not operate to extend the time prescribed in an applicable limitation statute of the forum.

Hutchings v. Lamson, 96 Fed. 720 (C. C. A. 7th C. 1893), certiorari denied 189 U. S. 514;

Platt v. Wilmot, 118 Fed. 1019 (C. C. A. 2nd C. 1902, memo dec.), affirmed 193 U. S. 602 (1904);

See also *Continental Illinois Bank & Trust Co. v. Best*, 20 Fed. Supp. 80 (D. C., S. D., N. Y. 1937).

It is respectfully submitted that the question of the extra territorial effect of a statute of limitation of the state in which a cause of action accrues, when different than a statute of limitations of the state in which the suit is brought, presents a matter of great general importance which should be passed upon by this Court and that this Court should invoke its supervisory jurisdiction in this respect in view of the conflict between the decision of the Circuit Court of Appeals in this case and the applicable

local decisions of the states of Michigan and Minnesota, especially in view of the conflict of the decision herein and that of other Circuit Courts of Appeal.

Wherefore your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 8774—Nick Maki, appellant, v. George R. Cook Company, a Michigan corporation, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the Judgment herein of the said Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioner may have such other and further relief as to this Court may seem proper.

GEORGE R. COOKE COMPANY, Petitioner,

By Thomas H. Adams,
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